A

Shahrizat, Rashid & Lee (sued as a firm) & Ors v Elvi Sazali bin Ja'afar (as administrator for the estates of Bahari bin Jalid and Jaafar bin Bahari) & Ors and another appeal

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(IM)(NCvC)-2255–12 OF 2021 AND P-02(IM)(NCvC)-2334–12 OF 2021

C AHMAD ZAIDI IBRAHIM, HASHIM HAMZAH AND FAIZAH JAMALUDIN JJCA

20 MAY 2025

D *Civil Procedure — Striking out — Application for — Defendants application to strike out plaintiffs' claim dismissed by High Court — Whether facts, issues and reliefs sought for by plaintiffs were distinct and substantively different from previous suit — Whether suit was inhibited by res judicata and estoppel — Rules of Court 2012 O 18 r 19*

E Pursuant to a joint venture agreement ('JVA') between the plaintiff and one Dynasty Palace Sdn Bhd ('DPSB'), the plaintiff sold their lands to DPSB for the purpose of development. DPSB was represented by the third defendant. The first, second and fourth to 14th defendants were lawyers and partners in the third defendant. The plaintiffs were represented by their own lawyers ie the F 15th to 18th defendants. As per the term of the JVA, DPSB paid the purchase price totalling RM1.8m into the third defendant's client account to be held as stake holder for the plaintiffs. The plaintiff later discovered that the purchase monies payable to them had been siphoned out and paid to someone else. Predicated on that, the plaintiff commenced actions against the defendants, G including the present suit ('Suit 199'), claiming damages for the loss of their monies. The plaintiffs alleged, inter alia, that the defendants had conspired to commit fraud, deceit, breach of trust, breach of duty by lawyers and misappropriation of stakeholder monies held by the third defendant. The defendants denied and disputed the plaintiffs' allegation and claim. This was H followed by them applying under O 18 r 19 of the Rules of Court 2012 to strike out the plaintiffs' claim. Their applications were however dismissed by the High Court. Hence, these appeals. The plaintiffs had previously filed two different suits against the defendants ('Suit 19' and 'Suit 176'). In Suit 19, the plaintiff sued their own solicitor for accounts and damages for breach of I contract and breach of trust. In Suit 217, the plaintiffs claimed against DPSB and the first to third defendants seeking the following reliefs: (a) for the retransferring of the land; (b) damages; and (c) exemplary damages. Consequently, the defendants had deposed the following common grounds to show that the plaintiffs' claim herein was unsustainable: (i) multiplicity of

action; (ii) res judicata; (iii) abuse of court process; and (iv) estoppel.

Held, dismissing the appeals:

(1) The claim and the issues in Suit 217 were different from the one in the Suit 199 herein. Even though reference were made to the JVA in the statement of claim, the reliefs sought in Suit 199 concerned the stakeholder monies and not really the status of the JVA. It could not be disputed that there were issues to be decided and could not be said that the plaintiff's claim in Suit 199 herein was one that was obviously unsustainable. The disputed material facts between the plaintiff and the defendant could only be conclusively determined in a full trial with the aid of viva voce evidence. It could not be determined summarily. As to the defendant's submission that the plaintiff had taken inconsistent stands/positions in all the three suits in respect for the JVA, that was a matter for trial, for the plaintiff to explain via vivo voce evidence, the alleged inconsistent position taken by them. In respect of the defendant's denial of liability pertaining to the first defendant's act, the fact that the first defendant was at all material time a partner of the third defendant and had implicated the other defendants, the issue as to whether the other partners (the fourth defendant to the 14th defendant) had knowledge and therefore were complicit to the first defendant's action to defraud the plaintiff was a matter for trial. A full trial would enable the court to determine if the third defendant was vicariously liable for the wrong action by the first defendant (see paras 24–25 & 28–29).

[Bahasa Malaysia summary

Menurut satu perjanjian usaha sama ('JVA') antara plaintif dan Dynasty Palace Sdn Bhd ('DPSB'), plaintif menjual tanah mereka kepada DPSB untuk tujuan pembangunan. DPSB diwakili oleh defendan ketiga. Defendan pertama, kedua, dan keempat hingga ke-14 adalah peguam dan rakan kongsi dalam defendan ketiga. Plaintif diwakili oleh peguam mereka sendiri iaitu defendan ke-15 hingga ke-18. Mengikut terma JVA, DPSB membayar harga belian berjumlah RM1.8 juta ke dalam akaun pelanggan defendan ketiga untuk dipegang sebagai pemegang kepentingan bagi pihak plaintif. Plaintif kemudiannya mendapati bahawa wang belian yang perlu dibayar kepada mereka telah diselewengkan dan dibayar kepada pihak lain. Berdasarkan itu, plaintif memulakan tindakan terhadap defendan, termasuk guaman ini ('Saman 199'), menuntut ganti rugi bagi kehilangan wang mereka. Plaintif antara lain mendakwa bahawa defendan telah berkomplot untuk melakukan penipuan, pembohongan, pecah amanah, pelanggaran kewajipan oleh peguam dan penyalahgunaan wang pemegang kepentingan yang dipegang oleh defendan ketiga. Defendan menafikan dan mempertikaikan dakwaan dan tuntutan plaintif. Ini diikuti dengan permohonan mereka di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan tuntutan plaintif.

Permohonan mereka bagaimanapun ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Plaintif sebelum ini telah memfailkan dua saman berbeza terhadap defendan ('Saman 19' dan 'Saman 176'). Dalam Saman 19, plaintif menyaman peguam mereka sendiri untuk akaun dan ganti rugi bagi pelanggaran kontrak dan pecah amanah. Dalam Saman 217, plaintif menuntut terhadap DPSB dan defendan pertama hingga ketiga, memohon relif berikut: (a) untuk pemindahan semula tanah; (b) ganti rugi; dan (c) ganti rugi teladan. Akibatnya, defendan telah mengemukakan alasan-alasan berikut untuk menunjukkan bahawa tuntutan plaintif dalam kes ini tidak mampan: (i) tindakan berganda; (ii) res judicata; (iii) penyalahgunaan proses mahkamah; dan (iv) estopel.

Diputuskan, menolak rayuan-rayuan:

(1) Tuntutan dan isu dalam Saman 217 adalah berbeza daripada yang terdapat dalam Saman 199. Walaupun rujukan telah dibuat kepada JVA dalam pernyataan tuntutan, relif yang dipohon dalam Saman 199 adalah berkenaan dengan wang pemegang kepentingan dan bukan status JVA itu sendiri. Tidak dapat dipertikaikan bahawa terdapat isu-isu yang perlu diputuskan dan tidak boleh dikatakan bahawa tuntutan plaintif dalam Saman 199 adalah sesuatu yang jelas tidak mampan. Fakta-fakta material yang dipertikaikan antara plaintif dan defendan hanya boleh ditentukan secara konklusif dalam perbicaraan penuh dengan bantuan keterangan viva voce. Ia tidak boleh ditentukan secara ringkas. Berhubung dengan penghujahan defendan bahawa plaintif telah mengambil pendirian/posisi yang tidak konsisten dalam ketiga-tiga saman berhubung dengan JVA, perkara itu adalah untuk dibicarakan, bagi plaintif untuk menjelaskan melalui keterangan viva voce, pendirian yang didakwa tidak konsisten yang diambil oleh mereka. Berhubung dengan penafian defendan terhadap liabiliti yang berkaitan dengan tindakan defendan pertama, fakta bahawa defendan pertama pada setiap masa material adalah rakan kongsi defendan ketiga dan telah melibatkan defendan-defendan lain, isu sama ada rakan kongsi lain (defendan keempat hingga defendan ke-14) mempunyai pengetahuan dan oleh itu bersubahat dengan tindakan defendan pertama untuk menipu plaintif adalah perkara untuk dibicarakan. Perbicaraan penuh akan membolehkan mahkamah untuk menentukan sama ada defendan ketiga bertanggungjawab secara vikarius atas tindakan salah oleh defendan pertama (lihat perenggan 24–25 & 28–29).]

Legislation referred to

Partnership Act 1961
Rules of Court 2012 O 18 r 19

Appeal from: *Elvi Sazali bin Ja'afar (sebagai pentadbir harta pusaka Bahari*

bin Jalid dan pentadbir harta pusaka Jaafar bin Bahari) & Ors v Lim Chai Loy (didakwa sebagai seorang individu dan bekas rakan kongsi Shahrizat Rashid & Lee) & Ors [2022] MLJU 1100 (High Court, Penang).

Seri Rajan Navaratnam (with Oazair bin Huneid Tyeb) (Shahrizat Rashid & Lee) in Civil Appeal P-02(IM)(NCvC)-2255–12 of 2021for the appellant.
Lee Kok Hao (Ong and Manecksha) in Civil Appeal P-02(IM)(NCvC)-2334–12 of 2021 for the appellant.
Jimmy Gay Choon Hee (Ismail Khoo & Assoc) in Civil Appeal P-02(IM)(NCvC)-2255–12 of 2021 for the respondent.
Jimmy Gay Choon Hee (Ismail Khoo & Assoc) in Civil Appeal P-02(IM)(NCvC)-2334–12 of 2021 for the respondent.

Ahmad Zaidi Ibrahim JCA:

INTRODUCTION:

[1] The parties herein shall be referred to as they were before the High Court (HC) in Civil Suit No PA-22NCVC-199–09 (Suit 199 of 2019).

[2] This is our decision for two appeals viz, Civil Appeal No P-02(M)(NCvC)-2255–12 of 2021 ('Appeal No 2255') and Civil Appeal No P-02(M)(NCvC)-2334–12 of 2021 ('Appeal No 2334'). We heard both the appeals at one go. The appeals emanated from the decision of the learned judicial commissioner ('LJC') dated 22 November 2021 for encls 10 and 20 respectively.

[3] Vide encl 10, filed by defendant 3 to defendant 14 and encl 20, filed by defendant 2 respectively, the defendants applied under O 18 r 19 of the Rules of Court 2012 to strike out the plaintiffs' writ and statement of claim against them. On 22 November 2012, the LJC dismissed both the said applications. Dissatisfied, D3-D14 and D2 appealed to the Court of Appeal. Hence, the two appeals herein.

[4] As the parties are the same and the main facts relate back to the same subject matter, viz, the joint venture agreement ('JVA') and the stakeholders' monies, the two appeals were heard together.

BACKGROUND FACTS AND CHRONOLOGY OF EVENTS:

[5] As the parties are very well versed with the pleaded facts of this case, there is no necessity for us to repeat them in toto herein, save when it is necessary and relevant to do so.

[6] The brief background facts leading to the two appeals herein are as follows: pursuant to a joint venture agreement ('the JVA') between the plaintiff and one Dynasty Palace Sdn Bhd ('DPSB'), the plaintiff sold their lands to DPSB for the purpose of development. As per the term of the JVA, DPSB paid the purchase price totalling RM1.8m into defendant 3's client account to be held as stake holder for the plaintiffs.

[7] At all material times, relating to the JVA and land transaction, DPSB was represented by defendant 3. Defendants 1, 2, 4 to 14 are lawyers and the partners in defendant 3. The plaintiffs were represented by their own lawyers, Messrs Rosnah & Partners (defendant 15 to 18).

[8] Fast forward, the plaintiff later discovered that the purchase monies payable to them had been siphoned out and paid to someone else. Predicated on that, the plaintiff commenced actions against the defendants, including the present suit, Civil Suit No PA-22 NCvC-199–09 of 2019 ('Suit 199') claiming damages (general, special and exemplary damages) for the loss of their monies.

[9] The plaintiffs alleged, inter alia, that the defendants had conspired to commit fraud, deceit, breach of trust, breach of duty by lawyers and misappropriation of stakeholder monies held by defendant 3.

[10] The defendants denied and disputed the plaintiffs allegation and claim, as per in their respective statement of defence ('SOD'). This was followed by them applying, vide encls 10 and 20 respectively, to strike out the plaintiff's claim. As aforementioned, on 22 November 2021 their applications were however dismissed by the High Court.

SUBMISSIONS:

Appeal 2255 by D3-D14 (in respect of encl 10)

[11] Before us, learned counsel for the defendants 3 to defendant 14 submitted that the LJC was plainly wrong and was in error in dismissing encl 10 on the following grounds:

(a) in failing to find that the plaintiff's claim/suit disclose no reasonable cause of action against the defendants, is frivolous, scandalous, vexatious and an abuse of the court process;

(b) in failing to find that the plaintiffs have no sustainable cause of action against the defendants for fraud and the breaches pleaded;

(c) in failing to rule that there are no serious issues to be tried;

(d) in failing to appreciate that the plaintiffs had previously filed two

different suits (PA-22NCVC-19–01 of 2017 ('first suit') and PA-22NCVC-176–11 of 2017) ('second suit') against the defendants which were based on the same facts, same cause of action and reliefs, wherein, similar issues were raised and were reventilate in the present Suit 199;

(e) in failing to find that there is a multiplicity of actions and the multiplicity of actions/proceedings amounted to an abuse of court process and is inhibited by res judicata and estoppel;

(f) in failing to appreciate that the plaintiffs had approbated and reprobated in their claim against the defendants;

(g) in failing to rule that Suit 199 would result in double recovery and unjust enrichment as they had already obtained judgment for the earlier mentioned suits/actions;

(h) in failing to appreciate that the defendants were never the solicitors for the plaintiffs and therefore in failing to rule that the plaintiffs claim for breach of duty by lawyers is unsustainable; and

(i) in failing to appreciate that the JVA had been terminated and therefore there exist no sustainable claim in respect of stakeholder's monies.

[12] The long and short of it, counsel for defendants 3 to defendant 14 submitted that based on the aforesaid, the plaintiff's Suit 199 herein is tainted with mala fide, is frivolous and one that is obviously unsustainable and thus ought to be struck out. Hence, the consequential effect would be that the defendant's appeal herein, ought to be allowed and the decision of the LJC be set aside.

Appeal 2334 by defendant 2 (in respect of encl 20)

[13] For Appeal 2334 for encl 20, learned counsel submitted that the LJC was erroneous and plainly wrong in dismissing encl 20 by failing to consider the following:

(a) apart from this suit filed, there were two previous suits (Suit 19 of 2017 and Suit 176 of 2017) filed by the plaintiffs based on the same facts and issues. This amounted to multiplicity of action and an abuse of court process and ought to be struck out;

(b) that the issues pertaining to the statutory declaration by defendant 1, the JVA, the stakeholder monies and the negligence by the lawyers had been raised and ventilated in the previous/earlier suits. Thus, res judicata and estoppel barred the filing of Suit 199 herein;

(c) that the plaintiffs had made inconsistent stand and had approbate and reprobate pertaining to the status of the JVA and since the plaintiffs'

A stand was that the JVA had been terminated, their claim should fall. Thus, the LJC was in error in failing to rule as such;

(d) that the plaintiffs had obtained judgment and was awarded damages for Suit 176 of 2017. Thus, Suit 199 herein amounted to double recovery and unjust enrichment. The LJC had erred in failing to rule as such;

B

(e) that defendant 2 did not represent the plaintiffs in the transaction and thus the plaintiff claim for professional negligence, dishonesty and misconduct against him is unsustainable;

C

(f) that defendant 2 was not the stakeholder to the plaintiffs; and

(g) that as defendant 2 is no longer a partner of defendant 3, the claim by the plaintiff in Suit 199 is contrary to the Partnership Act.

The plaintiffs' reply submission

D

[14] Conversely, learned counsel for the plaintiffs submitted that the LJC was correct in deciding that the defendant's application as per encls 10 and 20 are without merit.

E

[15] Counsel submitted that the defendants had failed to show that the plaintiff's claim is one that is clearly unsustainable base on the following facts:

(a) the existence of the statutory declaration dated 23 November 2018 by defendant 1 ('Lim Chai Loy') who admitted to 'siphoning' the stakeholder monies and conspiring with defendant 15 ('Mahenthran'), defendant 16 ('Reshi') and defendant 18 ('Rosnah') and in inducing defendant 3 to make payments of the stakeholder monies;

F

(b) that defendant 1 implicated defendant 2 ('Lim Mok San') in connection to the stake holder's monies held by defendant 3. Since defendant 1 and defendant 2 were at all material time partners of defendant 3, counsel submitted that, the plaintiff's claim against defendant 3 and against defendant 4-defendant 14 who are also partners in defendant 3, is one that is obviously not plainly unsustainable;

G

H

(c) defendant 2 disputed and denied defendant 1's allegation against him and had lodged a police report against defendant 1. Counsel submitted the dispute between defendant 1 and defendant 2, can only be determined in a full trial and not summarily by affidavit evidence. Therefore, counsel submitted that the LJC was correct in His Lordship ruling and decision;

I

(d) on the issue of duplicity of action, counsel submitted that the submission by counsel for the defendants is without merit because the cause of action for Suit 199 herein is entirely different from the two previous suits. According to counsel although the suits shared some common facts, in

particular the JVA, the targeted parties are different. Thus Suit 199 is not caught by res judicata. Also, the reliefs sought for in Suit 199 herein are different and not prayed for in the other earlier suits; and

(e) regarding the defendant's counsel's contention that the plaintiff's claim relating to the stakeholder monies is unsustainable because the JVA had been terminated, the plaintiffs' counsel submitted that the plaintiffs disputed it and instead claimed that the JVA is still valid as held by the court in the other suit. According to counsel, this disputed fact cannot be resolved summarily.

OUR DECISION AND FINDINGS

[16] As earlier mentioned, both encls 10 and 20 respectively are application by defendant 2 to defendant 14 to strike out the plaintiffs claim under O 18 r 19 of the ROC 2012.

[17] The law is trite that in such application, the burden on the plaintiffs is to show/prove that the claim against the defendant is one that is not unsustainable.

[18] From the affidavits (encls 11 and 21 respectively), filed in support of their respective applications to strike out the plaintiff's claim in Suit 199 the defendants had deposed the following common grounds to show that the plaintiffs' claim herein is unsustainable:

(a) multiplicity of action;

(b) res judicata;

(c) abuse of court process; and

(d) estoppel.

[19] The defendants' counsel argued that the facts, issues and reliefs sought by the plaintiffs herein are essentially similar and the same as pleaded by the plaintiffs in the two other earlier Suits which had been ventilated and determined in favour of the defendants by the court. Therefore, counsel submitted that for the court to order Suit 199 to go for trial would result in reopening the same issues and reliefs which had been considered and determined by the court in the two earlier suits (Suit 176 of 2017 and Suit 19 of 2017).

[20] Conversely the plaintiffs' counsel, submitted that the claim and reliefs sought for the Suit 199 are different from the ones sought for in the two earlier Suits and there for not barred by res judicata nor estoppel.

[21] Thus, in determining whether the facts, issues and reliefs sought for by the plaintiffs in Suit 199 are distinct and substantively different from the previous Suit and whether Suit 199 herein is inhibited by res judicata and estoppel, it is pertinent for us to look at the three suits:

(a) in Suit 19 of 2017 ('first suit') the plaintiff sued their own solicitor (Tetuan Rosnah & Partners) for accounts and damages for breach of contract and breach of trust; and

(b) in Suit 217 of 2017 ('second suit') the plaintiffs claimed against DPSB, defendant 1, defendant 3 and defendant 2 seeking the following reliefs:

(i) for the retransferring of the land;

(ii) damages (for the value of the land; for professional negligence, dishonestly, misrepresentation, vicarious liability, for unjust enrichment; and

(iii) exemplary damages.

[22] In the present Suit 199, the plaintiff sought for, inter alia, the following reliefs:

(a) special damages for fraud misconduct breach of trust, cheating relating to the stakeholder monies;

(b) special damages for fabrication of document;

(c) damages for negligence and for breach as stakeholder duties;

(d) damages for accessory to fraud; and

(e) exemplary damages.

[23] After having perused the plaintiffs' statement of claim in its entirety, we are constrained to agree with the submission by the learned counsel for the plaintiffs for both appeals.

[24] We noted that defendant 1, defendant 2 and defendant 3 applied for and was successful in striking out Suit 217 of 2017 (on 4 October 2019) and the striking out was subsequently upheld by the COA). However, we find that the claim and the issues in Suit 217 of 2017 different from the one in the present Suit 199 herein.

[25] In our view, even though reference were made to the JVA in the SOC, the reliefs sought in the present suit concerned the stakeholder monies and not really the status of the JVA.

[26] It is not disputed that defendant 3 was entrusted with RM1.8m, the

monies of which is payable to the plaintiff (subject to the terms of the JVA being fulfilled). It is also not disputed the plaintiff's land had been transferred to DPSB. It is also a fact that the RM1.8m stakeholders' money was never received by the plaintiff and that it was paid out to someone else. It is also not disputed that defendant 1 who was a partner in defendant 3 then, had via his statutory declaration admitted to fraudulently conspiring with defendants 15-defendant 18 in misappropriating the monies. It is not disputed that payment were made from the stakeholder account by way cheques issued and signed by defendant 2 who was then a partner in defendant 3.

[27] Defendant 2 did not deny issuing and signing the cheques of defendant 3 but disclaimed/denied knowledge of the scam pulled out by defendant 1. Defendant 2 denied being negligence and had lodged a police report against defendant 1.

[28] Based on the abovesaid facts, it cannot be disputed that there are issues to be decided, namely, whether defendant 2 was in the circumstance negligent and if he was indeed negligent, whether D3 in the circumstance is vicariously liable for the negligence of D2 and therefore liable for the losses suffered by the plaintiffs. In our considered view, these are matters for trial.

[29] Having considered the matters, we agreed with the submission by counsel for the plaintiff that:

(a) based on the disputed facts as per in the pleadings and in the affidavits by parties to encl 10, it cannot be said that the plaintiff's claim in Suit 199 herein is one that is obviously unsustainable;

(b) the disputed material facts between the plaintiff and the defendant can only be conclusively determined in a full trial with the aid of *viva voce* evidence. It cannot be determined summarily;

(c) as to the defendant's counsel submission that the plaintiff had taken inconsistent stands/positions in all the three suits in respect for the JVA, in our considered view, that is a matter for trial, for the plaintiff to explain via *vivo voce* evidence, the alleged inconsistent position taken by them. If indeed there is inconsistent position taken, that alone does not make the claim in Suit 199 unsustainable; and

(d) in respect of the defendant's denial of liability pertaining to defendant 1's act, the fact that defendant 1 was at all material time a partner of defendant 3 and had implicated the other defendants, the issue as to whether the other partners (defendant 4-defendant 14) had knowledge and therefore are complicit to defendant 1's action to defraud the plaintiff is a matter for trial. Knowledge, unless agreed/admitted can only be proved through hard evidence and not through affidavit. A full

A trial would enable the court to determine if defendant 3 is vicariously liable for the wrong action by defendant 1.

CONCLUSION

B **[30]** Based on the aforesaid, we find that the defendants (defendant 2-defendant 13) had failed to show that the plaintiffs' claim in Suit 199 is one that is obviously unsustainable. Therefore, we find no merit in both the appeals and therefore we dismissed both the appeal with cost of RM10,000 for each appeal subject to allocator.

C

Appeals dismissed.

Reported by Nabilah Syahida Abdullah Salleh

D

E

F

G

H

I